IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 542 of 1997
in
SPECIAL CIVIL APPLICATION No. 6425 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER
and
MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 & 2 - YES 2 TO 5 - NO

STATE OF GUJARAT

Versus

N. I. MEHTA, EX-DY.COMMISSIONEROF INDUSTRIES

Appearance:
MS BR GAJJAR AGP for Petitioners
MR NI MEHTA PARTY-IN-PERSON {Appeared on CAVEAT}

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE S.D.PANDIT

Date of decision: 13/08/97

C.A.V JUDGEMENT {Per : Pandit, J.}

Admitted. We have heard parties at length and in

the facts of the case, we proceed to dispose off this Letters Patent Appeal finally. Respondent N.I Mehta, waives service of notice of admission.

2. This Letters Patent Appeal is filed by the original respondent in Special Civil Application No. 6425 of 1988 against the judgement delivered by the learned Single Judge on 20th March, 1997 by which he allowed the petition and set-aside the order of compulsory retirement of respondent-original petitioner N.I Mehta.

3. Respondent-N.I Mehta, joined erstwhile State of Bombay as Malaria Supervisor in the year 1953. In May, 1957, he was transferred to the Industrial Department and posted as Junior Industrial Inspector. He was promoted as Senior Industrial Inspector in due course. On 6th July, 1966, he was promoted as Industries Officer, but before he could resume the charge as Industries Officer, his promotion was withheld on the allegations of adverse remarks in the years 1966-67, 1967-68. Hence, respondent had approached this Court by filing Special Civil Application No. 1035 of 1966. That Special Civil Application No. 1035 of 1966 was decided in his favour and the Letters Patent Appeal filed by the present appellant was also dismissed with costs. It seems that since then, petitioner was not getting his legitimate promotions. Though, he was eligible for promotion as Assistant Commissioner of Industries in February, 1975 he was actually given promotion in 1977. He had made a representation regarding the same but it was not considered and decided. Similarly, he was eligible for promotion as Deputy Commissioner of Industries in May, 1978, but he was given the said promotion in June, 1981. Against the said action, he had again made grievance and though he was eligible for promotion as Joint Commissioner of Industries on 22nd March, 1982, he was denied the said promotion and a person junior to him was promoted. All these has resulted into his filing of Special Civil Application No. 2457 of 1980. The said Special Civil Application No. 2457 of 1980 was ultimately decided in his favour but it seems that during this period his service record was also attempted to be tarnished by making certain "adverse remarks". Thereafter, he had made representation regarding the same. His representations were partly allowed and when some of the representations were pending, an order was passed on 11th August, 1987 to compulsorily retire him as per the provisions of Rule 161 (a) of the Bombay Civil Service Rules. Petitioner {respondent before us} had filed this Special Civil Application No. 6425 of 1980

challenging the said order of compulsory retirement by contending that the said order was not in the public interest and that order was the result of the arbitrary and malafide action taken in violation of Article 14 of the Constitution of India.

4. The claim of the petitioner was resisted by the present appellants by filing affidavit-in-reply of one S.N Modi, Under Secretary to the Government, Industries & Mines Department, and by producing decision of the Review Committee and Confidential records regarding his service. It was the contention of present appellants before the learned Single Judge that the decision of compulsory retirement was taken after taking into consideration all the confidential records of the respondent-petitioner, and particularly, of the latest year and that the said decision was taken "in the public interest" by following the due procedure and norms for taking such a decision. It was further contended that the said decision was not at all taken either on account of any malafides or it could not be said to be either arbitrary or irrational decision.

5. The learned Single Judge after considering the averments made and the material produced before him came to the conclusion that the decision of compulsory retirement was unreasonable and arbitrary one and in view of the service record of the petitioner-respondent, the said order of compulsory retirement was not justified and deserves to be quashed and set-aside. He, accordingly, allowed the said petition and set-aside the said order of compulsory retirement by awarding the costs to the respondent-petitioner.

6. Being felt aggrieved by the said decision, the respondents have come here in appeal before us. It is vehemently urged before us by Ms. Gajjar, the learned AGP for Appellant that the learned Single Judge has acted as if he was sitting as an Appellate Court and there was no justification for him to interfere with the said decision of the appellant, and he was not at all justified in interfering with the decision of the Appellants. It is contended before us that the learned Single Judge had exceeded his jurisdiction.

7. Before considering the said submissions made by her, we would like to refer to the decisions of the Hon'ble Supreme Court as regard the powers to be exercised by the High Court under Article 226 in case of an order for compulsory retirement. In the case of RAM EKBAL SHARMA v. STATE OF BIHAR & ANOTHER, AIR 1990 SC

1368, the following principles are laid down :-

" Even if an order of compulsory retirement is couched in innocuous language without making any imputations against the Government servant who is directed to be compulsorily retired from service, the Court, if challenged, in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the Government servant concerned or the order has been made bona fide and not with any oblique or extraneous purposes. Mere form of the order in such cases cannot deter the Court from delving into the basis of the order if the order in question is challenged by the concerned Government servant."

Then, in the case of S. RAMACHANDRA RAJU v. STATE OF ORISSA, AIR 1995 SC 111, the following principles are laid down :-

" Though the order of compulsory retirement is not a punishment and the Government employee is entitled to draw all retiral benefits including pension, the Government must exercise its power only in the public interest to effectuate the efficiency of the service. The entire service record or character rolls or confidential reports maintained would furnish the back drop material for consideration by the Government or the Review Committee or the appropriate authority. On consideration of the totality of the facts and circumstances alone, the Government Officer needs to be compulsorily retired from service. Therefore, the entire service record more particularly the latest would form the foundation for the opinion and furnish the base to exercise the power under the relevant rule to compulsorily retire a Government officer. On total evolution of the entire record of service if the Government or the governmental authority forms the opinion that in the public interest the officer needs to be retired compulsorily the court may not interfere with the exercise of such bona fide exercise of power but the court has power and duty to exercise the power of judicial review not as a court of appeal but in its exercise of judicial review to consider whether the power has been properly exercised or is arbitrary or vitiated either by malafide or actuated by extraneous consideration or arbitrary in retiring

the Government officer compulsorily from service.

8. The learned Single Judge has referred to the decision of Baikuntha Nath Das and Anr. v. Chief District Medical Officer, Baripada & Anr., AIR 1992 SC 1020 in para 20 and in the said para No. 20, he has stated as under :-

" In the case of Baikuntha Nath Das and Anr., v. Chief District Medical Officer, Baripada & Anr., reported in AIR 1992 SC 1020, the Hon'ble Supreme Court held that the order of compulsory retirement is not a punishment and it neither implies stigma nor suggestion of misbehavior. The order of compulsory retirement has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government Servant compulsorily. The order is passed on the subjective satisfaction of the Government. The Government or Review Committee shall have to consider the entire record of service before taking a decision in the matter of course attaching more importance to record and performance during the later years. The record to be so considered would naturally include the entire in the confidential record/character rolls, both favourable and adverse. If a government servant is promoted to a higher post nothwithstanding the adverse remarks, such remarks lost their sting, more so, if the promotion is based upon merit (selection) and not upon seniority. It has further been observed that order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference. Principles of natural justice have no place in the context of an order of Compulsory retirement. As the nature of the function is not quasi-judicial in nature and because the action has to be taken on the subjective satisfaction of the government, there is no room for importing the said facet of natural justice in such a case, more particularly when an order of compulsory retirement is not a punishment nor does it involve any stigma. However, the Hon'ble Supreme Court has further observed that this does not mean that judicial scrutiny is excluded

> altogether. While the High Court and the Supreme Court would not examine the matter as an Appellate Court, they may interfere if they are satisfied that the order is passed (i) malafide and (ii) that it is based on no evidence, or (iii) that it is arbitrary in the sense that no reasonable person would from the requisite opinion on the given material in short; if it is found to be a perverse order."

In para 21, he has also considered the decision of Apex Court in the case of UNION OF INDIA v. V.P SETH & ANR., wherein it has been laid down that an order of compulsory retirement can be made subject to judicial review only the ground of malafide, arbitrariness or perversity and that the rule of audi alteram partem has no application since the order of compulsory retirement in such a situation is not penal in nature.

9. The above circumstances clearly show that the learned Single Judge was aware of the legal position as regards the jurisdiction of the High Court to interfere with the order of compulsory retirement, passed by the Government which is being challenged under Article 226 of the Constitution.

10. In the facts and circumstances of the case, there is no dispute of the fact that the petitioner was initially denied the promotion to Industries Officer, which resulted into his filing Special Civil Application No. 1035 of 1996 and he was subsequently denied the promotions of Assistant Commissioner of Industries, Deputy Commissioner of Industries and Joint Commissioner of Industries on due dates on which he was entitled to and that had resulted into his filing Special Civil Application No. 2457 of 1980. It is also an admitted fact that respondent-petitioner had succeeded in both the petitions. It is not in dispute that respondent-petitioner has come before the Court with a case that the order of compulsory retirement, passed against him was passed arbitrarily, unreasonably and malafide. He had also specifically pleaded in his petition that certain adverse entries in his Confidential Report were not honest, bonafide and were not justifiable, but they were entered into and considered only with a view to deny him his due benefits as an employee of the Government. He had contended that those adverse remarks were also not so serious so as to take a drastic decision of compulsorily retiring him.

Therefore, in view of these specific averments and claim made by the respondent petitioner in his petition, the learned Single Judge has considered in detail all the so-called adverse remarks made against the present respondent-petitioner in order to consider as to whether the order of compulsory retirement was justifiable and whether it was an act of removal of the deadwood, passed in public interest. Therefore, the discussion of the adverse remarks and the consideration of the same by the learned Single Judge was only with a view to wreck the wave in order to know what was the truth. The said discussion and consideration on those adverse remarks made by the learned Single Judge in his elaborate and detailed judgement, which runs into 33 pages, was only with a sole object as to find as to whether the claim of the respondent-petitioner that action taken against him was unreasonable, arbitrary and malafide. If the discussion made by the learned Single Judge is considered, then it would be quite clear that it could not be said that the learned Single Judge has recorded any finding on weighing and appreciation of evidence contrary to any decision of any authority. It cannot be said that the whole object of the learned Single Judge was that of an appellate authority and the appreciation of the material on record was made by the learned Single Judge as if he was sitting as an appellate authority.

11. We are also taken through the service record of the respondent-petitioner by the learned counsel of the appellants and from the said entries, in his service record, we are also unable to hold that the action taken against the respondent-petitioner was an action with a view to remove the dead wood. There were no serious adverse remarks against him. On the contrary, there were certain good remarks in his service record which would come in the way of taking an action of compulsory retirement but those good remarks were also tried to be nullified by adding something against the said good remarks. For instance, in the year 1985-86, the overall assessment of the respondent petitioner was made as "a good officer" but in Amreli District provided too little by way of challenge..." In the previous year, i.e., 1984-85, it has been mentioned, "needs persuasion to entrust additional responsibility". Though the above remarks were made for the year 1984-85, there was no noting that he was asked to hold additional charge at such and such place and that he avoided to do so or that he had made representation for not giving additional charge. Not only that no material was produced before the learned Single Judge to justify the said remarks. On the contrary, the respondent had shown that as a matter

of fact he was holding additional charge during the said year of the District Industries Centre, Bhavnagar, in addition to his duties as General Manager, District Industries Centre, Amreli. Similarly, in June, 1983, the respondent-petitioner was posted as General Manager, District Industries Centre, Jamnagar and the jurisdiction of the respondent was extended to cover the Porbandar Sub-Division though the General Manager of District Industries Centre, Junagadh was a nearer officer to Porbandar.

12. The learned Single Judge has also taken into consideration the fact that the petitioner was promoted to the post of Deputy Commissioner of Industries as well June, 1981. Nodoubt, as the law of compulsory retirement has developed till today, merely because the employee happen to get promotion, it could not be said that action of compulsory retirement was unjustified, but at the same time, the law lays down that when the officer gets promotion then those promotions will naturally reduces the sting in the action, therefore, it is not possible to hold that the reference to the learned Single Judge to his promotion was improper and merely because of the same we are unable to hold that the present appeal deserves to be allowed. Ms. Gajjar has cited case of State of Orissa & Others v. Ram Chandra Das, AIR 1996 Supreme Court 2436. In this case, it has been held that the fact that the promotion was given even after the adverse entries were made, would not be sufficient to invalid order of compulsory retirement. In that case, the respondent had received one promotion and merely because of the same, the Orissa Administrative Tribunal had set-aside the order of compulsory retirement which has been quashed and set-aside by the Apex Court, by making the above observation. In that case, it was not the finding of the Orissa Administrative Tribunal that on considering the entire service record, the action of the Government in compulsorily retiring the respondent in that case was either an arbitrary action or unreasonable action, and the Administrative Tribunal had not also given any reasons for justifying the interference with the order of compulsory retirement. We have already mentioned above that merely because of the promotion, the action of compulsory retirement could not be quashed and set-aside. The learned Single Judge has not also come to the conclusion that order of compulsory retirement is unjustified only because of the promotion but he has referred to the order of promotion while considering the overall working of the petitioner respondent in order to find out as to whether the order of compulsory retirement was justified or not.

13. Ms. Gajjar, the learned AGP for appellants has cited before us the cases of BABU SINGH BAINS ETC. v. UNION OF INDIA & OTHERS., AIR 1997 SC 116; BHARAT RAM MEENA v. RAJASTHAN HIGH COURT, JODHPUR, AIR 1997 SC 896 and RAE BARELI KSHETRIYA GRAMIN BANK v. BHOLA NATH SINGH & Ors., AIR 1997 SC 1908, in support of her contention that the learned Single Judge was not justified in interfering with the discretionary order passed by the State Government in compulsorily retiring the respondent {original petitioner}. At the outset, we would like to mention that the facts of all these three cases would show that none of them is applicable to the facts before us. In case of Babu Singh (supra), 1997 SC 116 it was the case in which the appellant before the Apex Court viz., Babu Singh had challenged the order of the Estate Officer who refused to condone the delay in making application under Rule 11 (d) of the Chandigarh (Sale of Sites & Building [Amendment]) Rules, 1979 and the provisions of Capital of Punjab {Development & Regulation} Act, 1952. In the case of Bharat Ram Meena (supra), AIR 1997 SC 896, appellant before the Apex Court Bharat Ram Meena, a Judicial Officer had sought quashing of the adverse remarks made in the Annual Confidential Report. Whereas, in the case of Rae Bareli Kshretriya Gramin Bank {supra}, AIR 1997 SC 1908, the respondent Bholanath Singh was working as a Cashier-cum-Clerk in the appellant-Bank. He was charged with the allegation that he had fraudulently withdrawn a sum of Rs. 28,500/= on different dates from saving accounts of different account holders by forging the bank records and signatures of the saving bank account-holders. A chargesheet was served upon him to which the respondent gave his reply. An enquiry was conducted in which he did not participate. He was then punished on finding guilty of dismissal from service. The appellant preferred by the respondent was also dismissed and he had filed a writ petition under Article 226. The learned Single Judge of the Allahabad High Court had reversed the finding of fact recorded by the Inquiry Officer, after examining the evidence and had set-aside the order of dismissal. The Apex Court held that in a proceeding under Article 226, the High Court could not act as an Appellate Authority but exercising within the limits of judicial view to correct the error of law or procedural errors leading to manifest injustice. In that case, no such errors were pointed out nor any finding on that behalf was recorded by the High Court, and hence, the order of the High Court was set aside by allowing the appeal.

14. Thus, in our opinion, the learned Single Judge

has considered and perused the material on record in order to find out as to whether the order of compulsory retirement was not arbitrary or unreasonable and on examining the material on record, the learned Single Judge has recorded the finding that the order of compulsory retirement was not reasonable and that it was arbitrary and that the same seems to have been passed on account of the respondent - original petitioner's earlier attempts in approaching the Court to get due and legal reliefs. In our opinion, therefore, the order of learned Single Judge could not be said to be either illegal or improper the learned Single Judge has nor committed error of law or manifest error of facts. We are unable to hold that the learned Single Judge had either acted as an Appellate Authority and has valued and reviewed the material on record as an appellate authority and interfered with the order of compulsory retirement. Therefore, in the facts and circumstances, we hold that the present appeal deserves to be rejected. We, accordingly, reject the same. But, in the facts and circumstances of the case, we direct the parties to bear respective costs of this appeal. Appeal is dismissed.

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Prakash*